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IN THE

Supreme Court of the United States

October Term, 1958. No. 336

MAURICE A. WHEELER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAURICE A. WHEELER, petitioner, by his attorneys, Robert M. Taylor, Esq. and Alexander Cooper, Esq., prays that a writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Third Circuit, entered June 24, 1958, vacating the order of the United States District Court for the Western District of Pennsylvania entered March 20, 1957, granting the defendant's motion to suppress evidence, and the order of September 6, 1957, granting the motion to dismiss the indictment, and remanding the cause for further proceedings consistent with the opinion of that Court.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Pennsylvania, entered March 20, 1957, is reported in 149 F. Supp. 445; and the opinion entered September 1, 1957, appears to be unreported. A copy of its opinion appears in the appendix at page 23. A copy of Judge Miller's Memorandum Opinion dated August 17, 1955, appears in the Appendix at page 18.

The opinion of the United States Court of Appeals has not been reported as yet. A copy of its opinion appears in the appendix at page 30.

JURISDICTION.

The jurisdiction of this Court is involved under Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A. Section 1254(1). The order and judgment of the Court of Appeals for the Third Circuit was entered on June 24, 1958. A copy of its judgment appears in the appendix at page 39. A timely Petition for Rehearing was denied August 8, 1958.

QUESTIONS PRESENTED.

1. Whether a Judge of co-ordinate jurisdiction sitting in the same court, may overrule the decision of each other regarding a motion to suppress evidence.

2. Can a judge on his own volition quash and set aside an indictment, merely to afford the Government a chance to appeal and review an interlocutory order?

STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED.

STATUTE: June 25, 1948, c. 646, 62 stat. 928, 28 U. S. C. A. 1254 (1):

This section provides:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

STATUTE: 18 U. S. C. 3731 (1952):

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

56 stat. 271 (1942), 18 U. S. C. 682 (1946):

"An appeal may be taken by and on behalf of the United States from the District Courts to a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act."

Rule 12 (b) (2) Fed. Rules Crim. Procedure, provides:

"The motion raising defenses and objections. Defenses and objections which must be raised.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the Court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitute a waiver thereof, but the Court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the Court at any time during the pendency of the proceeding."

Rule 48 (b) Fed. Rules Crim. Procedure, provides:

"(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT OF THE CASE.

The appeal in this case was taken by the Government on September 30, 1957, from the Order entered by the Court below on September 6, 1957, dismissing the indictment for the reason that the evidence on which said indictment was procured was under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

The defendant, by indictment dated September 9, 1954 in the Western District of Pennsylvania, was indicted for violation of Section 145 (b) of the Internal Revenue Code of 1939, 26 U. S. C. 145 (b) for the year 1950. The amount

of income taxes alleged to have been evaded amounts to $1470.16. He was arraigned on September 30, 1954, before the Honorable Judge McVicar and pleaded not guilty.

On October 18, 1954, defendant filed a motion for a Bill of Particulars and other motions to suppress evidence and to dismiss the indictment.

In the motion to suppress evidence filed October 18, 1954, the defendant alleged:

> "(First) The evidence obtained by the Bureau of Internal Revenue by the examination of the records and files of the defendant for the year 1950 was obtained ostensibly in the guise of a routine examination of defendant's income tax returns for civil liability, whereas it appears that the actual purpose thereof was to obtain evidence for criminal prosecution in violation of defendant's constitutional rights;
>
> "(Second) The defendant was not informed that the examination of his 1950 records and files was being made for the purpose of possible criminal prosecution and the evidence thus obtained may not be used in the trial on the grounds of self-incrimination."

In the motion to dismiss the indictment filed October 18, 1954, the defendant asked the Court to dismiss the indictment for the following reasons:

> "First: The evidence on which said indictment was procured was under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.
>
> "Second: The indictment fails to state facts sufficient to constitute an offense against the United States of America.
>
> "Third: The indictment is barred by the Statute of Limitations."

On December 9 and 10, 1954, a hearing on the said "Motion to Suppress Evidence" was held before the Honorable

Judge John L. Miller, in which there were called as witnesses Byron Krieger, Robert W. Corey and Robert J. Madden. The defendant did not testify before Judge Miller for the reason that he claimed the protection of the Fifth Amendment.

On the basis of the testimony presented at said hearing Judge Miller filed an opinion and order on August 16, 1955, in which the motion to dismiss the indictment was denied.

A petition for reargument and reconsideration was filed on November 15, 1955, and after hearing by Judge Miller on December 12, 1955, defendant's motion for reargument and reconsideration was dismissed on May 1, 1956. Defendant appealed from said order of Judge Miller on May 11, 1956, and on June 7, 1956, the United States Court of Appeals for the Third Circuit dismissed the appeal for lack of jurisdiction.

On June 9, 1956, a praecipe for appearance of defendant's new Counsel (present Counsel) was filed.

On August 27, 1956, defendant filed a petition for a rehearing on his motion to suppress evidence. On September 20, 1956, a petition by defendant's previous Counsel and order of Court was filed granting his previous counsel leave to withdraw from the case as representing the defendant.

On November 26, 1956, and January 4, 1957, a hearing on the said motion to suppress evidence was held before the Honorable Chief Justice Wallace S. Gourley, in which there were called as witnesses, on November 26, 1956, the defendant, Maurice A. Wheeler, and on January 4, 1957, Ross Thompson, Andrew L. Hankowski, Gilbert Robertson, George H. Lemay and Byron Krieger, all being government agents.

It is to be noted that the defendant and the other witnesses, except Byron Krieger, did not previously testify before Judge Miller.

At the time of the hearing on November 26, 1956, it was stipulated that all of the testimony presented at the hearing before Judge Miller on December 9 and 10, 1954, would

be incorporated as part of the record of the proceeding to be formulated before Chief Justice Gourley in disposing of the petition for rehearing.

Judge Miller, however, for a short time, did sit with Chief Judge Gourley during part of his hearing on the defendant's last petition for rehearing on his motion for suppression of the evidence.

On February 21, 1957, an order was entered directing this matter be assigned to the Honorable Wallace S. Gourley nunc pro tunc as of September 21, 1956, by Judge Miller with consent thereon of Chief Judge Gourley.

On March 20, 1957, the Court, by Chief Judge Gourley, entered an order granting the motion of the defendant to suppress the evidence. An appeal was taken by the Government to the United States Court of Appeals for the Third Circuit on April 5, 1957, under No. 12,257.

On June 6, 1957, an order was entered by the said United States Court of Appeals under case No. 12,257, extending the time for filing Appellant's Brief and Appendix to August 13, 1957. This order was based upon Appellant's reason that it was awaiting the decision of the Supreme Court of the United States in the *Carroll* case (354 U. S. 394, 1 L. ed. 2nd 1442, 77 S. Ct. 1332) which was decided on June 24, 1957.

On August 1, 1957, based on an agreement of the parties, the United States Court of Appeals dismissed the appeal.

On September 3, 1957, the United States of America filed a petition, without notice to defense Counsel and without leave of Court, in the office of the Clerk of the Court, a motion entitled "Motion for Rehearing and Reconsideration" based on alleged inconsistencies on the part of Chief Judge Gourley in overruling Judge Miller, his associate judge, on substantially the same set of facts and circumstances; and that the conclusion reached by Chief Judge Gourley was contrary to a decision of the United States Court of Appeals for the Third Circuit in the case of *United States of America v. Joseph Frank*, Appeal No.

12,168, filed May 15, 1957. (*United States v. Frank*, 245 F 2d 284.)

The Government's petition also adverted to Chief Judge Gourley's opinion filed on June 26, 1957, in the case of *In Re Terzich's Petition* (153 F. Supp. 651), in which he stated that in a multiple court each member of the Court should follow the rulings of an associate member where the same set of facts and the same questions of law arise.

The Court's attention is drawn to the fact that at the hearing held on September 6, 1957, before Chief Judge Gourley, the Government attorney agreed with the Court below that its petition for rehearing and reconsideration should really be considered as a motion to vacate and set aside the order of March 20, 1957, and for the entry of an order denying the suppression of the evidence.

Chief Judge Gourley found, after said hearing, that the same facts and circumstances were not *presented* to Judge Miller as were presented to him and, of course, the Appellee makes the same contention.

The Government also contended that the *Frank* case governed and controlled the disposition of the *Wheeler* case as to the requested suppression of the evidence; that the evidence in the *Wheeler* case was "on all fours" with the *Frank* case. Chief Judge Gourley found that the *Frank* case did not control the instant case and distinguished them by finding that in the *Frank* case the agents testified that the investigation made of Frank's tax returns was routine but they denied that they ever told the taxpayer they were merely conducting an investigation to determine routine civil tax liability, whereas in the *Wheeler* case the investigating agent was told by his superior that he was to express to the defendant that he was making a routine tax investigation and that said statement was made as a pretext to accomplish the underlying purpose of the investigation, to wit, to determine if the defendant was implicated in criminal liability with any employees of the Internal Revenue Service, and that said investigation was made with the

primary purpose of rendering the defendant and any person with whom he might have been associated directly or indirectly in the Internal Revenue Service as a possible subject for criminal prosecution.

Although the defendant's Counsel had not pressed the defendant's motion to dismiss the indictment filed on October 18, 1954, Chief Judge Gourley on September 6, 1957, acted upon it. On said data he filed an opinion and order refusing the Government's motion for reconsideration of the Court's order dated March 20, 1957, and granted the motion of defendant to dismiss the indictment.

It is noted that in the lower Court's order of September 6, 1957, the defendant's motion to dismiss the indictment was granted for the reason that the evidence on which said indictment was procured was under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

Also that in the Court's opinion of said date Chief Judge Gourley states:

"... The motion to dismiss the indictment falls within the provisions of Rule 12 (b) 2 of the Federal Rules of Criminal Procedure.'

"First: The evidence on which said indictment was procured was under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

"Second: The indictment fails to state facts sufficient to constitute an offense against the United States of America.

"Third: The indictment is barred by the Statute of Limitations."

Assuming all facts in the indictment to be true and without consideration of the circumstances under which the evidence was secured, the indictment states a cause of action sustainable under law and is not barred by the Statute of Limitations, nor does it fail to state facts suffi-

cient to constitute an offense against the United States of America. However, the reasons set forth in the first legal premises is sustainable in view of the finding of the Court that the indictment was procured under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

The Government's notice of appeal from the dismissal order entered by the Court below was filed on September 30, 1957, and the appeal was docketed under No. 12,482. Defendant filed his motion to dismiss this appeal.

On February 27, 1958, defendant filed a motion with this court to dismiss the said appeal for lack of jurisdiction. After hearing being heard on March 3, 1958, the court ordered that said motion to dismiss appeal be considered by the court hearing the argument on appeal.

Argument on said appeal and motion was heard on April 18, 1958.

On June 24, 1958, the Court of Appeals entered an order and judgment vacating the order of the United States District Court for the Western District of Pennsylvania entered March 20, 1957, granting the defendant's motion to suppress evidence, and its order of September 6, 1957 granting the motion to dismiss the indictment, and remanded the cause for further proceedings consistent with the opinion of that Court.

After the Court's said order and judgment were entered the petitioner filed a Petition for Re-argument which was denied.

The said order and judgment of the Court of Appeals for the Third Circuit is the basis for this petition for a writ of certiorari.

It is to be noted that the Government, by its Counsel petitioned Judge Gourley for a reconsideration of his order suppressing evidence, and stated that there was a disagreement between Judges in the same Court, on the same case. To this Judge Gourley answered and stated that he had conferred at great length (for two hours) with Judge

Miller and Judge Miller did not see any difference of opinion, in other words he agreed with Judge Gourley, relative to his decision on the new evidence submitted (p. 92b).

ARGUMENT.

REASONS FOR GRANTING THE WRIT.

1. In holding that Judges of co-ordinate jurisdiction sitting in the same Court and in the same case should not overrule the decisions of each other, and stating further in its instant decision, that the Third Circuit Court takes issue with the Second Circuit Court and will not follow the opinion in the case of *Dictograph Products Company vs. Sonotone Corporation*, 230 F. 2d 131, this Court of Appeals has created a clear conflict of basic Federal Law which has not been, but should be, settled by the Supreme Court.

The instant decision clearly states that it does not agree with the opinion of the Second Circuit, in the case of *Dictograph Products Co.* (supra) and rather, will follow its own thinking as set forth in the case of *T. C. F. Film Corporation vs. Gourley*, 240 F. 2d 711.

It appears that in the instant case, the sharp line of difference between the cases lies in the fact of "availability of the original Judge to hear the motion for reconsideration." The Third Circuit sets forth a rule that should the original Judge be available, then practically speaking, another Judge cannot hear the motion for reconsideration; otherwise there would be an abuse of discretion. This line of reasoning, we fail to follow, rather we hold with the logic of the reasoning of the Second Circuit in the *Dictograph* case (supra) to the effect that, primarily, we are interested in rights and wrongs and speedy justice. We contend that to follow the reasoning of the Third Circuit, as in this case, would be tantamount to prohibiting a Judge from re-

considering his own decision, even though additional ev
dence is presented to him.

This thinking sets up a system of making a litigant g
through the ordeals of an unnecessary trial and expens
We argue that a situation such as this must be clarifie
and a ruling made by the Supreme Court.

The record discloses that although Judge Miller denie
the first motion for suppression of the evidence and for dis
missal of the indictment without prejudice, the defendant's
new counsel filed another petition for rehearing of th
motion to suppress evidence only and did not press reco
sideration of the question of dismissal of the indictment
Further the record discloses that defendant's new petitio
for rehearing was heard in the beginning by both Judge
Miller and Judge Gourley and Judge Miller finding that h
was to be tied up in lengthy litigation permitted Judge
Gourley to sit in his place and to act for him, with his con
sent, and in order to create no administrative mix-up, signed
a nunc pro tunc order. Nowhere in the record is there an
thing to show that Judge Gourley did not consult and hol
counsel with Judge Miller before rendering his final opin
ion. In effect Judge Gourley did not create an abuse of
his discretion, for the record shows that this petition was
heard originally by Judge Gourley and Judge Miller and he
had Judge Gourley continue to sit, as it were, in his place
with his full consent to reconsider in the same manner a
if he, Judge Miller, was sitting alone.

These recorded facts are contrary to the appellate opinion
which clearly bases its thinking on a set of facts where
there are two entirely separate judges in the same District
Court who have not consulted with each other and who
have acted independently of each other. In the cases dis
cussed at great length by the Appellate Court each judge
of the District Court involved was making an independent
decision without any consultation or discussion or without
affording the opportunity to the other judge to sit with him
or act for him as in this case, concerning the petition for
reconsideration.

To permit any different application of logic for a distinction between the present case and the ones discussed in the appellate opinion would result in a substitution of thinking on the part of the appellate for the judges involved in the District Court, as to facts alone.

The record further clearly discloses that the facts of the present case do not for one moment give rise to an interpretation which can result in one District Court Judge overruling another Associate Judge's opinion of the same District Court on the identical facts, because the new Counsel's petition for rehearing was considered by both judges and merely continued to a conclusion by one with the full consent of the other.

It is not a new or novel situation for a judge to change his line of thinking from an original opinion and on a reconsideration rule contrary to his original opinion, and this we urge is what actually took place concerning Judge Miller and Judge Gourley for to say otherwise would run contrary to the facts of the record. *Dictograph Products Company v. Sonotone Corporation*, 230 F. 2d 131. "From page 134 (1, 2)": no one will suggest that the first Judge himself may not change his mind and overrule his own order, so that the basis of the doctrine can only be that there are reasons why the second Judge may not do so that do not exist when the first does."

This explanation is clearly indicated by virtue of Judge Miller's denial of the first motion wherein he shows doubt as to the Government's position when he adds the words "without prejudice to the defendant's right to object to the admission of the evidence at the trial."

Further, in the instant case, the opinion fails to adhere to the evidence adduced at the second hearing, wherein, at least three other witnesses appeared besides the witness, Krieger, that the first judge (Judge Miller) heard. The testimony of these additional witnesses, particularly Thompson and Hankowski, clearly established that fraud and deceit were practiced upon the defendant. Further, the

opinion disregards the uncontradicted fact that the second judge (Judge Gourley) consulted with and held long conference with the first Judge, prior to his granting the suppression order. In effect the Second Judge merely acted almost as though the rehearing was being held before the first Judge, when on further reconsideration overruled his own decision.

Were we to be bound by thinking of this instant opinion a judge could never reconsider his own decision, once he made it, and he would have to sit by until the appellate court reviewed same. We find this thinking without proper justification for good justice. An appellate court can never review evidence in the same light or understanding as a judge who actually sits and hears and sees the witnesses themselves.

In view of the above we contend that without proper clarification by the Supreme Court, these situations will materially affect the proper administration of criminal justice.

II. Although the Court in its opinion further stated that Judge Gourley simultaneously entered an order dismissing the indictment, the best that could be said for the facts as shown in the record is that as to this particular phase of his opinion he must have consulted with Judge Miller because the record clearly shows that the new counsel's petition only concerned itself with a motion to suppress evidence and actually did not ask for reconsideration pertaining to the refusal to dismiss the indictment, as appears in the petition. It is interesting to note further that neither the appellant nor the appellee pressed questions concerning the indictment but the matter was brought forth by Judge Gourley only for purposes of creating an avenue of appeal to the Government as in the *Janitz* and *Pack* cases referred to in the appellate opinion.

The appellee is in accord with the thinking of the Appellate Court in that there can be a legal distinction be-

tween evidence to suppress and evidence that is presented to the Grand Jury and for that reason the new counsel's petition did not concern itself with the validity of the indictment.

Corroborative of the above argument relative to the fact that the new counsel's petition for suppression was considered as being heard not alone by Judge Gourley but in fact by Judge Miller, through and with Judge Gourley, is the position taken by the Government's counsel. During the course of the trial and the taking of testimony, the Government's counsel never raised any question concerning the authority of Judge Gourley to sit and hear the petition for suppression. Appellee urges that the Government's counsel did not raise this question because he knew that Judge Miller did sit with Judge Gourley during the early period of the trial.

In the instant case the evidence clearly establishes that at the time the investigation was made by the revenue agents, the agents were told by their superior, Ross V. Thompson, that they were to express to the defendant that they were making a routine tax investigation and that said statements were made as a pretext to accomplish the underlying purpose of the investigation, to wit, to determine if the defendant was implicated in criminal liability with any employees of the Internal Revenue Service, and that said investigation was made with the primary purpose of rendering the defendant and with any person with whom he might have been associated directly or indirectly in the Internal Revenue Service as a possible subject for criminal prosecution.

It is submitted that the evidence overwhelmingly shows without any reasonable doubt that the underlying purpose of examining the defendant's tax returns and records was to find evidence of criminal wrongdoing on the part of any employee of Internal Revenue Service and whether the defendant was implicated or involved in any such wrongdoing. That, unquestionably proof of fraud and deceit was per-

petrated on the defendant was shown when Ross V. Thompson, the Government Agent in charge of the investigation, testified that one, Stanley Barczak, a former Internal Revenue Service employee, had made several affidavits accusing other members of the personnel of having committed unlawful acts and defendant's name was mentioned in one of them. That he, (Thompson) instructed Revenue Agent Krieger to make the usual routine income tax investigation of defendant's returns and records for 1950 and 1951, and in addition thereto to look out for and to be aware and alert for any transactions involved in the personnel investigation, giving Krieger a list of names of the personnel involved.

Further, that his real purpose in sending Krieger to Wheeler's office was not to investigate defendant's income tax returns but that there was another purpose,—to find facts in order to base criminal prosecution against the personnel and possibly against the defendant.

Also, that although he told Krieger to investigate defendant's income tax returns, in reality he was to go there to see whether or not defendant and some employees of the Internal Revenue Service had done something wrong; and that he had used the examination as a means to determine whether or not Wheeler did engage in any unlawful activity with any employee of the Internal Revenue Service. That the primary purpose of the examination was to get connection with the personnel involved and secondarily, a regular examination. Also that he had no idea there was any tax fraud existing.

Defendant submits that the facts as found in this case by Chief Judge Gourley certainly indicate that his order to dismiss the indictment was not based on any objection brought against the indictment itself, and that the defendant had made no attack on the indictment. That the government's case failed because it had no lawful evidence to support it; and that the lower court's order of dismissal is not the kind of a judgment to which the criminal ap-

peals statute is directed. In *United States v. Janitz*, 161 F. 2d 19, Judge Goodrich states, "We bear in mind the undisputed proposition that the government's appeal must be based upon a right given in the statute if it is to have one."

The instant appeal should, therefore, have been dismissed for lack of jurisdiction for the same reason that the appeals were dismissed in the *Janitz* case and *United States v. Pack*, 247 F. 2d 168, particularly, because it is not founded upon any objection brought against the indictment itself, and accordingly, is not authorized by the applicable statute.

The petitioner further contends that the government has attempted to bring before the Court an appeal from the District Court's order suppressing evidence rather than the dismissal of the indictment, which it is estopped from doing as it is only an interlocutory order and not a final order. (*Carroll v. United States*, supra.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

ROBERT M. TAYLOR,
ALEXANDER COOPER,
Attorneys for Appellee.

Appendix

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA
v.
MAURICE A. WHEELER. } Criminal Action No. 14337

MEMORANDUM OPINION AND ORDER.

OPINION.

MILLER, District Judge.

Defendant was indicted for tax evasion with respect to his 1950 income tax return under Int. Rev. Code of 1939 §145(b). The indictment was filed September 9, 1954. Defendant was arraigned and pleaded not guilty September 30, 1954. The case is before the court upon defendant's motion for bill of particulars, motion to suppress evidence and to dismiss indictment, and motion for return of books and records, the government's answers to defendant's motions, and defendant's reply affidavit to the government's answers.

At the argument upon the motions, counsel indicated that they would be able to agree upon defendant's motion for a bill of particulars. Therefore, that motion will be denied without prejudice.

Defendant's motion to suppress evidence and to dismiss avers, *inter alia*, that the indictment fails to state facts sufficient to constitute an offense against the United States and is barred by limitations. No basis for these contentions is apparent, and none has been suggested to the court. As to limitations, *see* Int. Rev. Code of 1939, §3748, as amended, 68 A. Stat. 929 (1954) (now Int. Rev. Code of 1954, §6531).

The remaining averments of defendant's motions relate to defendant's contentions with respect to the search and seizure and self incrimination clauses of the constitution, based upon the circumstances under which the government acquired defendant's records with respect to his 1950 income and the information educed from those records. On November 15, 1954, following the argument upon defendant's motions, the court ordered a hearing upon the actual issue raised by defendant's motions.

At the hearing thus ordered, testimony was taken of Byron Kreiger and Robert J. Madden, Internal Revenue Agents, and Robert W. Corey, Chief of the Intelligence Division of the Internal Revenue Service for the Pittsburgh district. The following facts appear from the testimony.

Kreiger is an Internal Revenue Agent, regularly assigned to the audit division of the Detroit district director's office. His ordinary duties are confined to Michigan. In May 1953 he was assigned to Pittsburgh, being told only that there was need for a man familiar with corporate and net worth cases. The assignment came from the inspection service of the Internal Revenue Service in Washington. In Pittsburgh he reported to Ross Thompson, staff officer in the inspection service, whose regular post of duty was in Washington. Thompson assigned certain returns for Kreiger to examine. Kreiger became part of a team that was conduct-

ing a personnel investigation of the Pittsburgh office of the Internal Revenue Service, certain undisclosed irregularities in the Pittsburgh office having been alleged. The investigation ultimately resulted in a number of indictments. While in Pittsburgh, he examined, in addition to defendant's returns, one corporate case and one net worth case. He had not been instructed to look for evidence of criminal violations, but he was told to report any evidence of defendant's connection with certain individuals. The examination of defendant's return was related in an undisclosed way to the problem that Thompson was investigating in the Pittsburgh office.

On June 3, 1953, Kreiger telephoned defendant and told him that he was an Internal Revenue agent and that he had his income tax return for examination. No further information was then given to defendant. Kreiger spent several days in defendant's office with defendant's permission examining defendant's records. In so doing, he came across the names of certain individuals that he had been told to look out for. He reported this fact to Andrew Hankowski, who was one of the team conducting the personnel inspection in Pittsburgh. Hankowski was from the Intelligence unit of the Internal Revenue Service in Milwaukee and was also part of the inspection service there. The Intelligence service primarily conducts fraud investigations which may result in civil or criminal penalties.

Kreiger, with defendant's permission, took part of defendant's records to the Pittsburgh Internal Revenue offices, giving him a receipt therefor, primarily because there was insufficient room to work on them in defendant's office. Kreiger kept defendant's records until August 3 or 4, 1953, at which time he turned them over to an agent named Hawthorne who was examining defendant's 1952 return. By that time, Kreiger's investigation of defendant's 1950 and 1951 returns had become a joint investigation with the Intelligence unit in Pittsburgh, Kreiger having referred the case to Intelligence on finding items indicative of fraud. Those items are involved in the instant proceedings.

The joint investigation commenced on August 4, 1953, when Kreiger introduced agent Madden, from the Intelligence unit in Pittsburgh, to defendant. Defendant was then told for the first time that it was believed that certain fees had not been reported, that the case had criminal aspects, that his returns for 1950 and 1951 would continue to be investigated, and that the investigation would be expanded into 1949 and 1952. Defendant then freely offered his books and records for inspection to clear up the whole matter, although he was then told that anything obtained might be used in a criminal action against him. Of course, at that time, and continuing up to the present time, the records and evidence here involved were already in Madden's possession, the records having previously been obtained by Madden from Kreiger and by Kreiger from defendant.

As the authorities cited below indicate, no immunity is conferred by the failure of an Internal Revenue agent, in making a routine examination, to advise a taxpayer of his constitutional rights or to advise of what should be obvious, i.e., that appropriate action will be taken if evidence of a crime is disclosed. The foregoing is especially sound as applied to the instant case, the taxpayer in question being an experienced attorney. On the other hand, the constitutional protection against unlawful searches and seizures extends to evidence obtained through fraud and deceit as well as to that obtained through the unlawful use of force. *Gouled v. United States*, 255 U. S. 298, 305-06 (1921).

In the instant case there has been no evidence of affirmative deceitful or fraudulent misrepresentations. On the other hand, although Kreiger's procedure in examining defendant's return was routine, the fact that Kreiger, from the Detroit office, was making the examination, as part of the investigation growing out of alleged irregularities in the Pittsburgh Internal Revenue office, was certainly not routine.

Problems similar to those here raised have been considered in a number of recent cases: *Smith v. United States*,

348 U. S. 147, 150-51 (1954); *Turner v. United States*, 222 F. 2d 926 (4th Cir. May 23, 1955), petition for cert. filed 24 U. S. Law Week 3040 (June 20, 1955); *Moutis v. United States*, 219 F. 2d 782, 787-88 (5th Cir. 1955); *United States v. Burdick*, 214 F. 2d 768, 773-74 (3d Cir. 1954), remanded 348 U. S. 905 (1955); *Chieftain Pontiac Corp. v. Julian*, 209 F. 2d 657, 659-60 (1st Cir. 1954); *Sasser v. United States*, 203 F. 2d 535, 539 (5th Cir. 1953); *Montgomery v. United States*, 203 F. 2d 887, 893 (5th Cir. 1953); *Hanson v. United States*, 186 F. 2d 61, 64-66 (8th Cir. 1950); *Himmelfarb v. United States*, 175 F. 2d 924, 937-38, 939-40 (9th Cir.), cert. denied 338 U. S. 860 (1949); *United States v. Wolrich*, 129 F. Supp. 528 (S. D. N. Y. 1955), modifying 119 F. Supp. 538 (1954); *United States v. Guerrina*, 126 F. Supp. 609 (E. D. Pa. 1955), modifying 112 F. Supp. 126 (1953); *United States v. American Stevedores, Inc.*, 16 F. R. D. 164, 170-71 (S. D. N. Y. 1954); *United States v. Manno*, 118 F. Supp. 511, 516 (N. D. Ill. 1954); *United States v. Lipshitz*, 117 F. Supp. 466 (E. D. N. Y. 1954); *United States v. Levy*, 99 F. Supp. 529, 531 (D. Conn. 1951).

After consideration of the facts above set forth, in the light of the foregoing authorities, the court is of the opinion that defendant's motions should be denied, without prejudice to defendant's right to object to the admission of evidence obtained from his records. Cf. *Smith v. United States*, supra. An appropriate order is entered.

IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA
v.
MAURICE A. WHEELER.

No. 14337 Criminal.

OPINION.

WALLACE S. GOURLEY, Chief Judge:

The Indictment in this proceeding was returned on September 9, 1954. Defendant was arraigned and plead not guilty on September 30, 1954. On October 18, 1954, defendant filed a motion to suppress evidence and to dismiss the indictment, claiming, inter alia, that the evidence secured from the defendant upon which the indictment was premised was secured under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

A hearing was held before the Honorable John L. Miller, an associate member of this court, on December 9 and 10, 1954, in which there were called as witnesses Byron Krieger, Walter W. Corey and Robert J. Madden.

On the basis of the testimony presented at said hearing, Judge Miller filed an Opinion and Order on the 16th day of August, 1955, in which the motion to suppress the evidence and to dismiss the indictment was denied. A petition for reargument and reconsideration was filed on

November 15, 1955, and after hearing by Judge Miller, defendant's petition for reargument and reconsideration was dismissed on May 1, 1956. Defendant appealed from said Order of Judge Miller on May 11, 1956, and on June 7, 1956 the United States Court of Appeals for the Third Circuit dismissed the appeal for lack of jurisdiction.

On August 27, 1956, defendant filed an additional petition for rehearing on the motion to suppress evidence, and due to the involvements of Judge Miller in a prolonged criminal trial and other matters unrelated to the instant proceeding, coupled with the additional fact that this member of the court was in charge of the criminal docket at the time of the filing of the petition for rehearing, after consultation with my associate, Judge Miller, and in order to expedite the administration of the issues raised, my associate requested and agreed that this member of the court would hear and consider the second petition for rehearing. In conformity thereto, an order was entered by Judge Miller assigning the matter to this member of the court.

On the 21st day of September, 1956, the court entered an order directing the parties to appear for the taking of additional testimony on the 26th day of November, 1956. On said date Maurice A. Wheeler, the defendant, was called to testify, the nature and extent of his testimony appearing in 156 pages which were filed of record on March 1, 1957.

It was specifically stated at the time of hearing on November 26, 1956, that this member of the court would not hear any matters that had been heard by Judge Miller or disposed of by him, but that the court would only proceed with new matter. Defendant Wheeler did not testify before Judge Miller for the reason that he claimed the protection of the Fifth Amendment.

At the completion of the testimony on November 26, 1956, due to the inability of the parties for divers reasons to proceed with further testimony, the court entered an order continuing the hearing until January 4, 1957. On said date the court stated that if the defendant was unable to pro-

ceed on January 4, 1957, the motion to suppress the evidence and to dismiss the indictment would be refused.

On January 4, 1957, defendant called as witnesses Ross Thompson, Andrew L. Hankowski, Gilbert Robertson and George H. Lemay, and recalled Byron Krieger. This record comprised 110 additional pages.

The hearings, therefore, held before this member of the court on the petition for reconsideration and rehearing of the orders entered by Judge Miller comprised 270 additional pages of testimony, none of which testimony was presented to or considered by Judge Miller. In addition thereto, defendant did not testify before Judge Miller nor were any of the witnesses, who appeared before this member of the court, examined before Judge Miller with the exception of Byron Krieger, and the matters about which Byron Krieger was examined before this member of the court were not considered or evaluated by Judge Miller.

At the time of hearing on November 26, 1956, it was stipulated that all of the testimony presented at the hearing before Judge Miller on December 9 and 10, 1954, would be incorporated as part of the record of the proceeding to be formulated before this member of the court in disposing of the petition for rehearing.

On the 20th day of March, 1957, the court entered an order granting the motion of the defendant to suppress the evidence. An appeal was taken to the United States Court of Appeals for the Third Circuit on April 5, 1957, and on August 1, 1957, based on an agreement between the parties, the United States Court of Appeals dismissed the appeal.

On September 3, 1957, the United States of America filed a petition, without notice to defense counsel and without leave of court, in the office of the Clerk of Courts, which motion is entitled "Motion for Rehearing and Reconsideration", based on alleged inconsistencies on the part of this member of the court in overruling my associate, Judge Miller, on substantially the same set of facts and circumstances. That the conclusion reached by this member of the court

was contrary to a decision of the United States Court of Appeals for the Third Circuit in the case of United States of America v. Joseph Frank, Appeal No. 12168, filed May 15, 1957.

The government's petition also adverted to this court's opinion filed in Petition of Marko Terzich on July 26, 1957, in which the court stated that in a multiple complement court each member of the court should follow the rulings of an associate member where the same set of facts and the same questions of law arise. In the Petition of Marko Terzich the same factual situation for all practical intents and purposes existed and the same legal question was presented as was disposed of in a similar case by an associate member of this court. I reaffirm my belief that in a multiple complement court where the same factual and legal questions are presented, it is the duty and requirement of the members of said court to follow the rules and orders of an associate member of the court. However, in the instant proceeding the same facts and circumstances were not presented to my associate, Judge Miller, as were considered by this member of the court, as is reflected by the following facts:

Maurice A. Wheeler, the defendant, did not testify before Judge Miller and none of the matters presented in the hearings held before this member of the court on November 26, 1956 and January 4, 1957, were presented to or considered by my associate, Judge Miller.

The procedure followed by this member of the court was in accordance with the decision of the United States Court of Appeals for the Third Circuit in the case of TCF Film Corp., et al. v. Wallace S. Gourley and United Exhibitors, Inc., 3 Cir., 240 F. 2d 711.

Since Judge Miller was not available to hear the petition for rehearing and entered an order assigning the matter to this member of the court, the consideration which was given to the questions raised by this member of the court did not and could not under any circumstances be

construed to be overruling or considering the disposition of matters as presented to Judge Miller.

I can find no basis in any way whatsoever to support the position of the government that the order entered by this court which suppressed the evidence, entered on March 20, 1957, to be an intrusion on any previous order entered by Judge Miller for the reason that the testimony presented to this member of the court was different and unrelated to matters not considered by Judge Miller. Furthermore, due to the inability to hear the matter and his written assignment to this member of the court, disposition was made of the petition for rehearing solely on the facts presented to this member of the court in addition to the record before Judge Miller which was stipulated by the parties to be made part of the record.

The additional reason for the rehearing motion filed by the government is the statement that the decision of the United States Court of Appeals for the Third Circuit in the case of United States of America v. Joseph Frank, filed May 15, 1957, governs and controls the disposition of the matter before this member of the court and that the decision of this member of the court is contrary to the decision in the Frank case.

There is no question that the government has authority to examine books, papers and records of a taxpayer and that no taxpayer should be so naive as to conclude that an audit by a Revenue Agent is made for purely social purposes. I am furthermore in agreement with the rule of law that an Internal Revenue Agent is not required to warn a defendant taxpayer that the taxpayer does not have to give any information to the Internal Revenue Agent who is investigating his tax returns, and that any information secured might be used against him in a criminal proceeding. Every investigation made by an Internal Revenue Agent of a taxpayer's records is in a sense routine at its inception since the agent cannot foresee what liability, civil or criminal will grow out of his investigation in any given case.

However, the Frank case is readily distinguishable on its facts from the case at bar. In the Frank case the agents testified that the investigation made of Frank's tax returns was routine but they *denied that they ever told the taxpayer they were merely conducting an investigation to determine routine civil tax liability.*

In the instant case the evidence clearly establishes that at the time the investigation was made by various Internal Revenue Agents, the agents were told by their superior that they were to express to the defendant that they were making a routine tax investigation and that said statements were made as a pretext to accomplish the underlying purpose of the investigation, to wit, to determine if the defendant was implicated in criminal liability with any employees of the Internal Revenue Service, and that said investigation was made with the primary purpose of rendering the defendant and any person with whom he might have been associated directly or indirectly in the Internal Revenue Service as a possible subject for criminal prosecution. In short, the evidence overwhelmingly shows without any reasonable doubt that the underlying purpose of investigating the defendant's tax records was to find evidence of criminal wrongdoing on the part of any employee of Internal Revenue Service and whether the defendant was implicated or involved in any such wrongdoing.

So, in actuality, a fraud was perpetrated on the defendant when he was told that the investigation was routine to determine his civil liability to the government when the truth and in fact the purpose of the investigation was to ferret out acts of wrongdoing of any employee of Internal Revenue Service and whether the defendant was implicated or involved therein, and if the defendant was so implicated or involved, he was to be included as a possible subject for criminal prosecution. The conclusion must, therefore, be reached that the decision in the Frank case has no relevancy nor does it apply in any degree to the facts as they exist in this proceeding.

At the time of the hearing held before this member of the court, counsel for the government or the defendant did not discuss or press the second count of the motion originally filed on October 18, 1954, which, inter alia, asked the court to dismiss the indictment for the reason that the means by which the evidence was procured were under circumstances constituting self-incrimination and in violation of defendant's constitutional rights.

There was no basis for my associate, Judge Miller, to dismiss the indictment in view of the conclusions which he reached on the motion to suppress evidence. However, in view of the conclusions reached by this member of the court, by Opinion and Order filed on March 20, 1957, it becomes necessary to dispose of defendant's motion to dismiss the indictment. It is my judgment, for the reasons which have been set forth most exhaustively in the opinion filed on March 20, 1957, that the indictment should be dismissed for the reason that it was procured under circumstances constituting self-incrimination and in violation of defendant's constitutional rights. U. S. v. Wheeler, 149 F. Supp. 445.

The motion to dismiss the indictment falls within the provisions of Rule 12(b)(2) of the Federal Rules of Criminal Procedure.

> "FIRST: The evidence on which said indictment was procured was under circumstances constituting self-incrimination and in violation of defendant's constitutional rights."
>
> SECOND: The indictment fails to state facts sufficient to constitute an offense against the United States of America.
>
> THIRD: The indictment is barred by the Statute of Limitations."

Assuming all facts in the indictment to be true and without consideration of the circumstances under which the evidence was secured, the indictment states a cause of action

sustainable under law and is not barred by the statute of limitation, nor does it fail to state facts sufficient to constitute an offense against the United States of America. However, the reasons set forth in the first legal premise is sustainable in view of the finding of the court that the indictment was procured under circumstances constituting self-incrimination and in violation of defendant's unconstitutional rights.

An appropriate Order is entered.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,483

UNITED STATES OF AMERICA,

Appellant

v.

MAURICE A. WHEELER,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1958

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges*

OPINION OF THE COURT.

(Filed June 24, 1958)

By McLAUGHLIN, *Circuit Judge*.

This case raises a number of weighty questions, the only one of which we will have to decide is whether there are sufficient reasons for sustaining the granting of a motion upon the second rehearing thereof by a second judge of a district court after a first judge of the same court had already twice denied it.

The defendant was indicted on September 9, 1954 for evading 1950 income taxes. On October 18, 1954 he filed motions to suppress certain of the evidence which he alleged had been acquired illegally by the government and to dismiss the indictment because its return had been based on the presentation of that evidence to the grand jury.

The alleged illegality in the acquisition of the evidence was that defendant made his records available to investigating agents who were ostensibly conducting a routine examination when in fact the investigation was actually intended to obtain evidence for possible criminal prosecutions of others with whom defendant was suspected of being involved. At hearings on the motions December 9th and 10th, 1954 it developed that defendant had originally been suspected of having connections with some misfeasance by Internal Revenue Service employees. It is beyond question that attention first focused on defendant's tax returns because of this suspicion, so that when an audit was made it had the two-fold purpose of ascertaining whether the returns were correct and whether they would show involvement in the matter which was under special investigation. Evidence on the latter point seems to have been sought primarily for the purpose of constructing a case against other suspects rather than against Wheeler. In

any event the investigating agent revealed only the first of the two purposes to the defendant when he first approached him for the purpose of gaining access to defendant's records.

In fact the investigation developed nothing on the point of involvement, but it did turn up evidence which the authorities apparently considered warranted indictment for income tax evasion. The investigation thus concluded with exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud.

On these facts Judge Miller on August 17, 1955, denied the motion for suppression of the evidence and for dismissal of the indictment, without prejudice to defendant's right to object to the admission of the evidence at trial. On May 1, 1956, he entered an order denying defendant's petition for reargument and reconsideration of the motion. An appeal to this court was dismissed for want of jurisdiction.

On August 27, 1956, defendant's new counsel filed another petition for rehearing of the motion to suppress evidence. Hearing was held on the petition on November 26, 1956, and on January 4, 1957 before Judge Gourley. On February 21, 1957, an order was entered by Judge Miller assigning the disposition of the petition for rehearing to Judge Gourley *nunc pro tunc* September 21, 1956, with consent of Judge Gourley. It appears from the record that this was done that the matter might be speedily dispatched, as Judge Miller was involved in the trial of two lengthy cases and it would not be convenient for him to handle the petition.

On March 20, 1957, Judge Gourley granted the motion for suppression of the evidence. This order was not appealable. Carroll v. United States 354 U.S. 394 (1957). On September 3, 1957, the government petitioned for rehearing on the motion. The matter was heard on September 6, 1957, and denied on that date by Judge Gourley who simultaneously entered an order dismissing the indictment for having been returned as a result of presentation to the

grand jury of the evidence ruled to have been illegally acquired. The government appealed to this court. We therefore reach the question for decision.

In TCF Film Corp. v. Gourley, 240 F.2d 711 (3 Cir. 1957) this court sitting en banc and speaking through Judge Maris reaffirmed for this circuit the rule "* * * that judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other."[1] The rule might be more fundamentally stated that judges should not, if possible, place themselves in a position whereby in rendering impartial judgment on a question they might be required to overrule the decision of a judge of the same court in the same case. Cf. Price v. Greenway, 167 F.2d 196 (3 Cir. 1948).

In deciding the TCF case we refused to follow Dictograph Products Company v. Sonotone Corp., 230 F.2d 131 (2 Cir. 1956) any further than to recognize that the rule was not absolute and all-embracing and that there are exceptional circumstances which will permit one judge of a district court to overrule a decision by another judge of the same court in the same case. In other words there are occasional situations in which a judge cannot avoid placing himself in a position which may require him to reconsider a point already earlier decided in the same case by another judge of the same court. The TCF case in fact presented that very situation. The crux of the matter, then, is not whether a second judge on reconsideration of a question can or should overrule the first judge but whether he may properly entertain the reconsideration at all.

We thus have implicitly recognized that the rule is one regulating the exercise of discretion in acting rather than one denying power to act at all. Because the TCF case was a mandamus proceeding begun before entry of final

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[1] See authorities cited in TCF Film Corp. v. Gourley, supra, footnotes 1 and 2 p. 713.

judgment on the merits we decided only that the second judge had properly exercised discretion in reconsidering the case. We did not pass on whether the result he reached, which was also a matter of discretion, in permitting the amendment of the complaint was an abuse.

The exceptional circumstances which Judge Gourley found to justify his acting in this case were that Judge Miller was "unavailable" and had assigned the case to him "* * * because of its pressing urgency," and that "* * * none of the matters presented in the hearings held before * * * [Judge Gourley] were presented to or considered by * * * Judge Miller."

TCF Film Corp. v. Gourley, supra, involved a situation where the judge who had first denied a motion to amend and supplement the complaint was unavailable to consider the petition for rehearing by reason of the termination of his temporary assignment to the district in which the case was pending. We pointed out that other exceptional circumstances of unavailability of the first judge would be if he had died or resigned; it was obvious in these situations that if the petition for reconsideration were to be heard at all, it would have to be by another judge.

This case does not present a situation in which the first judge is unavailable in the sense that it amounts to an exceptional circumstance permitting a second judge to take the matter on rehearing with the inherent accompanying possibility of overruling the first judge. Judge Miller was not even temporarily disabled, but was active in the handling of certain other time-consuming and, no doubt, wearing litigation. The briefs indicate that he in fact sat with Judge Gourley for part of the hearing in this matter. That it was not immediately convenient for him to consider the renewed motion did not make him unavailable.

The more than three years that this case had been pending at the time Judge Gourley took it illustrates that the only "pressing urgency" involved was the commendable concern to speed the dispensation of justice by maintaining as nearly current dockets as possible. But that usually

desirable policy must sometimes give way to weightier or more delicate elements in the dispensation of justice. Here the element of "orderly functioning of the judicial process"[2] supersedes that of speeding a case to conclusion.

As we have pointed out, the heart of the matter is whether a second judge may properly entertain the reconsideration at all. We have indicated that if the first judge is available the matter should again be presented to him. But it is not always possible at the outset to determine whether the identical matter is simply being presented over again for reconsideration, or whether more accurately the matter is being reopened and additional matter presented bearing on the same question of law once decided on what was so far available.[3] In that latter situation the question has not really been decided earlier and is posed for the first time; the second judge ought, therefore, be free to render a decision.

It is true that some different witnesses testified before Judge Gourley than were heard by Judge Miller, but from an attentive perusal of the transcripts we fail to perceive that the substance of their testimony bearing on the motions to suppress the evidence and dismiss the indictment was any different. Therefore, though it was a proper exercise of discretion to take the new testimony, the decision on what was substantially the same testimony was nothing more than a review of Judge Miller's earlier decision and was an abuse of discretion. Such a review would under the circumstances have been an abuse even had the result been the same as Judge Miller's though the error would, of course, then have been harmless. And it would still under the circumstances have been an abuse of discretion even

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[2] The phrase is Judge Maris' in TCF Film Corp. v. Gourley, supra, p. 714.

[3] Permitting this latter situation to develop is again pretty much within the discretion of the judge to whom the matter is brought; such an exercise of discretion is largely untrammeled because the case is still malleable, not yet having gone to final judgment.

had the results reached by each judge on the merits been the opposite.

In this last conclusion at least we apparently are at odds with the Second Circuit in Dictograph Products Co. v. Sonotone Corp., supra. But if the second judge has as much chance of being in error on the merits as has the first judge in considering the same question, we fail to see why the fortuity (if it can be called that) of the second judge being right in the eyes of an appellate court should affect the operation of the rule designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented.

We are driven to the conclusion that the result in the Dictograph Products case was conditioned by the appellate court's conviction that the second judge had been right in dismissing the complaint whereas the first judge had been wrong in not doing so. The case really presents an argument favoring allowance of appeals from the denial of interlocutory orders which if granted would end the litigation, rather than requiring the case to wind through trial to final judgment and then upon review to find that the interlocutory order was in error and that the trial had been unnecessary.

Jurisdiction to entertain this appeal has so far been assumed, but defendant-appellee has pending a motion to dismiss the appeal for want of jurisdiction under 18 U.S.C. 3731[1] on the authority of United States v. Pack, 247 F.2d 168 (3 Cir. 1957) and United States v. Janitz, 161 F.2d 19 (3 Cir. 1947). The pertinent statute at the time Janitz

[1] 18 U.S.C. §3731 (1952).

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

was decided was 56 Stat. 271 (1942), 18 U.S.C. §682 (1946).[1] The Pack opinion held, after an exhaustive review of the legislative history, that the difference in wording of the revised §3731 had not been intended to work any change from the substantive meaning of §682.

In both Pack and Janitz the trial courts had entered orders suppressing certain evidence without which as a practical matter the government found itself unable to conduct an effective prosecution; the trial courts in both instances, frankly seeking to provide review for their suppression orders and ostensibly acting under Rule 48(b), Fed. Rules of Criminal Procedure, subsequently entered dismissals of the indictments. In Janitz, at page 21, this court said:

> "We think it is clear * * * that the learned Judge's order of dismissal was not based on any objection brought against the indictment at all. The defendants had made no attaek on the indictment. The Government's case failed because it had no testimony to support it. We think this is not the kind of a judgment to which the Criminal Appeals statute is directed."

The Pack opinion determined that the revised statute called for the same result in that case.

What we have here, however, is an appeal on behalf of the United States from a quashing and setting aside of an indictment, thought by the dismissing judge to have been illegally obtained. The dismissal was entered ex-

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[1] 56 Stat. 271 (1942), 18 U.S.C. §682 (1946):

"An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act."

plicitly under Rule 12(b)(2), Fed. Rules Crim. Procedure and not solely because of the government's failure or inability to prosecute. Nor was the dismissal, as appellees allege, simply a well-conceived device for putting before this court for review the interlocutory order suppressing the evidence. Consideration by us of whether an indictment is defective if obtained as a result of presentation to the grand jury of evidence unlawfully acquired by the government would not necessarily have also entailed consideration of the different question of whether the evidence involved was subject to a suppression order. And were we to consider both questions, reinstatement of the indictment would not necessarily compel a reversal of the suppression order. Jurisdiction for this appeal, therefore, is conferred by 18 U.S.C. §3731.

The motion to dismiss the appeal is denied. The order of March 20, 1957 granting the defendant's motion to suppress evidence, and the order of September 6, 1957 granting the motion to dismiss the indictment are vacated and the cause is remanded for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,483

UNITED STATES OF AMERICA,

Appellant

v.

MAURICE A. WHEELER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered March 20, 1957 granting the defendant's mo-

tion to suppress evidence, and the order of September 1957 granting the motion to dismiss the indictment be, and the same are hereby vacated, and the cause remanded for further proceedings consistent with the opinion of the Court.

Attest:
IDA O. CRESKOFF
Clerk

June 24, 1958.

Received & Filed
Jun 24 1958
Ida O. Creskoff
Clerk

LE COPY

FILED
OCT 3 1958
JAMES R. BROWNING, Clerk

No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1958

MAURICE A. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 336

MAURICE A. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 31-38) is reported at 256 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1958 (Pet. 39-40) and a petition for rehearing was denied on August 8, 1958. The petition for a writ of certiorari was filed on September 5, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals had jurisdiction to review the Government's appeal from the District Court's pre-trial dismissal of an indictment on the ground that it was based upon evidence obtained in violation of petitioner's privilege against self-incrimination.

2. Whether the Court of Appeals, assuming it had jurisdiction, properly reversed the pre-trial order of dismissal and suppression entered by one district court judge because it was contrary to the earlier ruling of another district court judge having co-ordinate jurisdiction.

3. Whether, on the merits, it was error for the second district judge to order dismissal of the indictment and suppression of the evidence.

STATUTE AND RULE INVOLVED

18 U.S.C.:

> SEC. 3731 [as amended by Sec. 5, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Appeal by United States*
>
> * * *
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * *

Federal Rules of Criminal Procedure:

Rule 12. *Pleadings and Motions before Trial; Defenses and Objections*

* * * * *

(b) *The Motion Raising Defenses and Objections:*

* * * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * *

STATEMENT

On September 9, 1954, petitioner was indicted in the United States District Court for the Western District of Pennsylvania for willful attempted evasion of his 1950 individual income tax. (R. 1a, 9a.) On October 18, 1954, petitioner, having pled not guilty, moved to suppress certain evidence and to dismiss the indictment. (R. 2a.) The motion to dismiss alleged,

inter alia, that the indictment had been procured "under circumstances constituting self-incrimination and in violation of defendant's constitutional rights." (Pet. 9, 23.) Judge John L. Miller granted a full hearing on the motion to suppress evidence, at which the testimony of several witnesses was taken. (R. 2a, 1b-31b.) Briefly, this testimony disclosed that, before the investigation began, petitioner, an attorney, was suspected of being connected with some misfeasance by employees of the Internal Revenue Service. An audit of petitioner's records was made which had the dual purpose of determining the correctness of petitioner's returns and also whether his records reflected any connection between petitioner and the suspected misfeasance. (R. 12a, 11b-17b.) The investigating agent called petitioner on the telephone and advised him that he had his 1950 income tax return for examination and would like to make an appointment to come to petitioner's office and examine his records. (R. 15b.) The agent did not advise petitioner that he was also interested in obtaining evidence with respect to any involvement with the suspected Internal Revenue employees. (R. 16b-17b.) An appointment was made for that afternoon, when petitioner turned his records over to the agent. (R. 15b, 26b.) The examination disclosed no criminal conduct on petitioner's part with respect to Internal Revenue personnel, but it did disclose the receipt of substantial legal fees which petitioner had not reported on his income tax return. (R. 20b-23b.)

On August 17, 1955, Judge Miller denied the motion to suppress evidence and the motion to dismiss

the indictment, without prejudice to petitioner's right to object at the trial to the admission of evidence obtained from his records. (R. 3a, 9a-14a.) In December, 1955, on petitioner's motion, Judge Miller heard reargument on the motions to suppress and to dismiss. On May 1, 1956, Judge Miller filed an opinion and order directing the dismissal of the petition for reargument and reconsideration. (R. 4a, 15a-16a.) Petitioner's appeal to the Court of Appeals for the Third Circuit was dismissed for lack of jurisdiction. (R. 4a.) Thereafter, petitioner filed a second petition for rehearing on his motion to suppress evidence before Judge Wallace S. Gourley, to whom the case had been assigned for trial. (R. 5a.) Judge Gourley, after hearing the testimony of several witnesses on the motion to suppress, granted petitioner's motion on March 20, 1957. (R. 5a-6a, 17a-26a.) The Government's motion for rehearing was denied on September 6, 1957, at which time Judge Gourley granted petitioner's previous motion to dismiss the indictment on the ground that it was based on evidence "procured under circumstances constituting self-incrimination * * *". (R. 7a, 28a-36a.) The Court of Appeals reversed Judge Gourley with respect to both the motion to suppress and the motion to dismiss and remanded the case for trial, holding that there were insufficient reasons to warrant Judge Gourley's granting of the motions on substantially the same evidence on which Judge Miller had twice denied them. (Pet. 31, 35.)

ARGUMENT

1. Petitioner's contention (Pet. 14-17) that the Court of Appeals lacked jurisdiction (*i. e.*, that Judge Gourley's order dismissing the indictment is not appealable under the Criminal Appeals Act, 18 U.S.C. Sec. 3731, *supra*) is based on the curious misstatement that the order "was not based on any objection brought against the indictment itself, and that the defendant had made no attack on the indictment" (Pet. 16). The record clearly shows that on October 18, 1954, petitioner moved to dismiss the indictment, alleging, *inter alia*, that it had been obtained "under circumstances constituting self-incrimination and in violation of defendant's constitutional rights". (*Supra*, pp. 3-4.) Judge Gourley dismissed the indictment on this ground (R. 34a-36a) and, as the Court of Appeals pointed out (Pet. 37-38), the dismissal was entered under Rule 12(b)(2) of the Federal Rules of Criminal Procedure (*supra*, p. 3). This case is, then, readily distinguishable from *United States* v. *Janitz*, 161 F. 2d 19 (C. A. 3d), and *United States* v. *Pack*, 247 F. 2d 168 (C. A. 3d), the cases relied upon by petitioner (Pet. 14, 17). In those cases the trial courts had ordered suppressed vital evidence without which the Government could not obtain convictions, and the indictments were dismissed for lack of prosecution. In the instant case the Government appealed from the pre-trial dismissal of an indictment thought by Judge Gourley to have been illegally obtained. We submit that the court below was plainly right in concluding that jurisdic-

tion for this appeal is conferred by 18 U.S.C., Section 3731.

2. Petitioner also contends (Pet. 11-14) that the Court of Appeals should not have based its decision on the rule that judges of coordinate jurisdiction, sitting in the same court and on the same case, should not overrule the decisions of each other, urging (Pet. 11) that this result is in conflict with *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (C. A. 2). But, in the first place, this rule is only "a discretionary rule of practice." Cf. *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199. Second, it should be noted that the court below stated at the very outset that the question for decision is "whether there are sufficient reasons" (Pet. 31) for departing from the rule that coordinate judges should not overrule each other in the same case, implying that the rule is not one to be followed blindly in all circumstances. The court's decision that the circumstances of this case did not justify departure from the rule surely presents no question which this Court need review. With respect to conflicts within the Court of Appeals itself, this Court has said, "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901. We submit that the promulgation of standards governing the circumstances under which district court judges within a particular circuit may overrule each other is equally a function which the Court of Appeals for that circuit should perform. Finally, we note that the court below concluded that the result in the *Dictograph Products* case, *supra*, was condi-

tioned by the Second Circuit's "conviction that the second judge had been right in dismissing the complaint whereas the first judge had been wrong in not doing so." (Pet. 36) In this case, as we show below, it is clear that, whether or not Judge Gourley abused his discretion in rehearing the same matter presented to and previously decided by Judge Miller, it is clear that he reached the wrong result and that reversal of his decision was required in either event.

3. On the merits, we submit that it is clear that Judge Gourley's orders dismissing the indictment and suppressing the evidence were erroneous. Even if it be assumed *arguendo* that Judge Gourley was right in holding that the evidence in question had been obtained from petitioner in violation of his privilege against self-incrimination, there would be no basis for dismissing the indictment. *Lawn* v. *United States*, 355 U. S. 339, 349-350; *Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359. But it seems clear that there was no such infringement of petitioner's privilege. The evidence furnished the investigating agent by petitioner is not rendered inadmissible by the fact that the agent did not advise him of the dual purpose of the examination, *i.e.*, that the case might develop into one of criminal prosecution. *Turner* v. *United States*, 222 F. 2d 926, 929-932 (C. A. 4th), certiorari denied, 350 U. S. 831; *Montgomery* v. *United States*, 203 F. 2d 887, 892-893 (C. A. 5th); *United States* v. *Frank*, 245 F. 2d 284, 286 (C. A. 3d); *Vloutis* v. *United States*, 219 F. 2d 782, 787 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 64-65 (C.A. 8th); Cf. *Powers* v. *United*

States, 223 U. S. 303, 313-314; *Wilson* v. *United States*, 162 U. S. 613, 621-624. This is true *a fortiori* here, where the initial suspicions that petitioner might have been involved in criminal conduct with employees of the Internal Revenue Service (as to which, Judge Gourley held, petitioner should have been warned) were not borne out by the investigation which disclosed wholly independent criminal conduct. It follows, therefore, that Judge Gourley erred in granting petitioner's motion to suppress evidence as well as in ordering the indictment dismissed. It should be noted, moreover, that denial of certiorari at this stage would not finally close the door on petitioner's contention. He is free to renew it at the trial (*Smith* v. *United States*, 348 U. S. 147, 150-151; *Cogen* v. *United States*, 278 U.S. 221, 224) and, in the event he is convicted, to urge it upon his appeal from the conviction.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1958.

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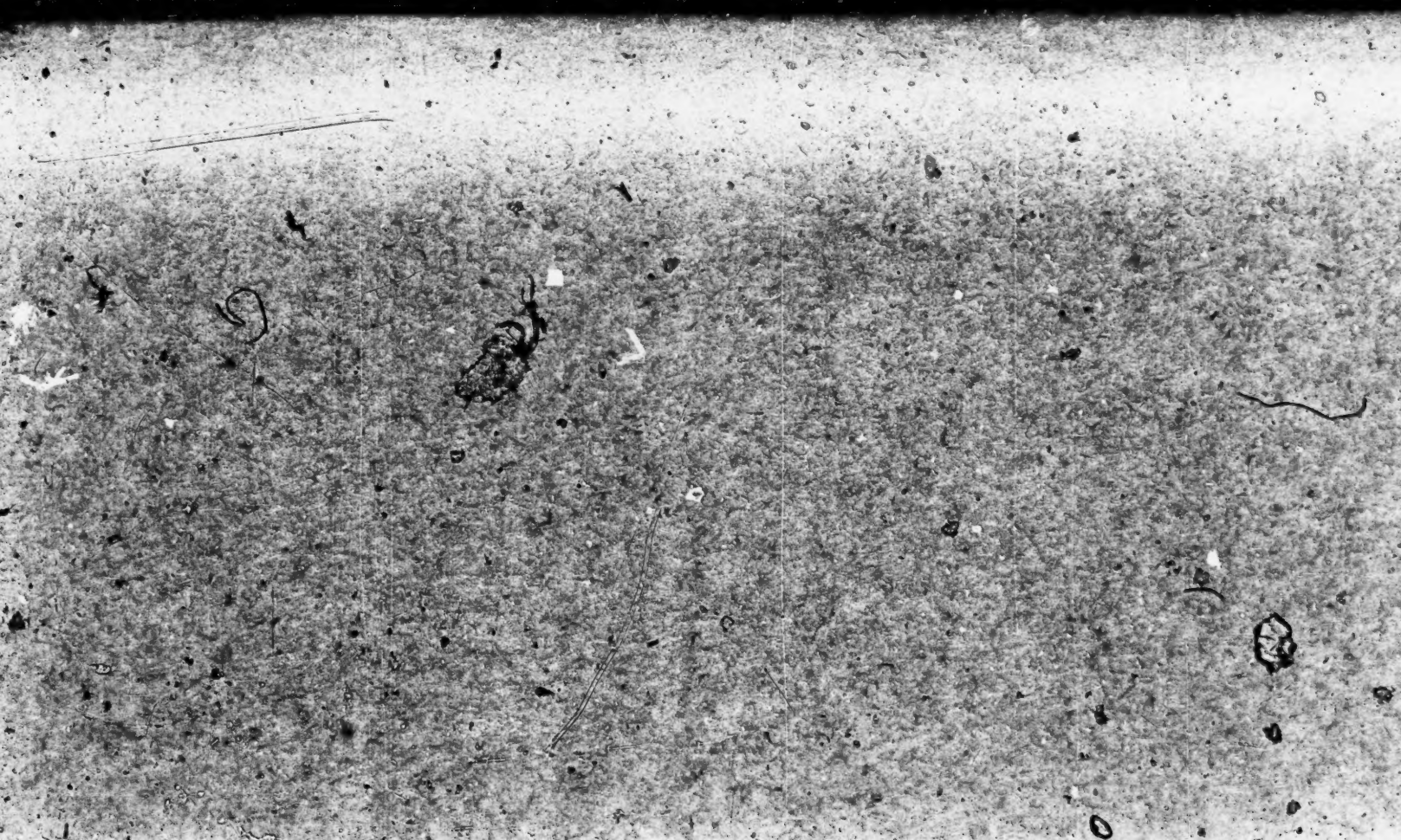

IN THE

Supreme Court of the United States

October Term, 1958. No. [redacted]

MAURICE A. WHEELER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO COURT OF APPEALS
FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING UNDER RULE 58.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1958. No. 336.

MAURICE A. WHEELER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING UNDER RULE 58.

TO THE HONORABLE, THE JUSTICES OF THE SAID COURT:

The petition of petitioner respectfully represents:

1. On October 27, 1958, this Court denied petitioner's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

2. The petitioner in his original petition for a writ of certiorari is of the opinion and belief that he has not treated with sufficient clarity that part of the opinion of the Court of Appeals for the Third Circuit which violates his consti-

tutional rights to a fair and impartial trial which is to take place consistent with the said opinion.

3. It is petitioner's contention that due to the mandate as outlined in the opinion of the Court of Appeals for the Third Circuit, the trial court Judge would be precluded from exercising his proper judicial functions concerning the admissibility of any evidence which treats with the motions for suppression of evidence in this case, in that he would be bound to overrule any objections raised by petitioner to the admissibility of such evidence during the course of the trial; and he would be precluded from submitting the question of misrepresentation fraud and deceit to the Jury. (*Smith v. United States*, 348 U. S. 147, 150-151).

4. The petitioner refers the Honorable Court's attention to that portion of the opinion of the Court of Appeals for the Third Circuit which reads as follows:

> "It is true that some different witnesses testified before Judge Gourley than were heard by Judge Miller, but from an attentive perusal of the transcripts we fail to perceive that the substance of their testimony bearing on the motions to suppress the evidence and dismiss the indictment was any different. Therefore, though it was a proper exercise of discretion to take the new testimony, the decision on what was substantially the same testimony was nothing more than a review of Judge Miller's earlier decision and was an abuse of discretion" (Page 35 of Petition for Writ of Certiorari).

5. The petitioner contends that the language above creates a mandate to the trial Judge directing him to admit over any objections the alleged evidence of misrepresentation, fraud and deceit practiced by the government agents. Further, this deprives the trial Judge from any judi-

consideration of such evidence despite the fact that in the original motion to suppress Judge Miller (whom the said Court of Appeals determined was more correct in his opinion than Judge Gourley), stated in his denial of the motion to suppress that he was doing so without prejudice to petitioner's right to object at the trial to the admission of evidence obtained from his records.

6. In light and in view of the obvious results of said opinion of the said Court of Appeals, the petitioner would be compelled to stand trial with prejudice as to objections to admissibility of alleged illegal evidence and would be deprived of having the Jury determine the question of trickery and fraud as to such evidence.

It would, therefore, be impossible for petitioner to receive a fair and impartial jury trial without prejudice to his constitutional rights. (*Smith v. U. S.*, supra.)

WHEREFORE, petitioner prays that this Court grant a rehearing and oral argument in this case.

Respectfully submitted,

By: ROBERT M. TAYLOR,
ALEXANDER COOPER,
Attorneys for Petitioner.

CERTIFICATE.

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay and confines itself to substantial grounds available to petitioner although not previously presented.